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Hatsopoulos Bros. Beat Investor Suit Over Energy Co. Merger

By **Reenat Sinay**

Law360 (November 19, 2018, 6:22 PM EST) -- A prominent engineer and his business-minded brother dodged a proposed investor class action on Friday when a Massachusetts federal judge ruled that the shareholders failed to back up their remaining breach of fiduciary duty claims in a suit alleging they were shortchanged in a 2016 merger between the brothers' energy-technology companies.

U.S. District Judge Leo T. Sorokin found that investors in American DG Energy Inc. did not make a convincing argument that George and John Hatsopoulos acted in their own interests at the expense of the shareholders in the acquisition of Tecogen Inc. by ADGE, or that George Hatsopoulos and Tecogen aided and abetted that breach.

The parties had debated in a Nov. 2 hearing whether **ADGE should be subject to the "entire fairness doctrine"** and be forced to prove in discovery that the deal was fair, since the brothers had a controlling interest on both sides of the agreement.

On Friday, Judge Sorokin decided that the entire fairness doctrine did not apply in this situation because there was no evidence that the brothers' interests conflicted with those of the minority shareholders. Instead, he said, the "business judgment rule" is at play here, which gives the companies' boards the benefit of the doubt that the merger was made in good faith, dismissing the case on all counts.

"Applying the entire fairness standard in a case without some conflict of interest would place a court in the role of assessing, likely years after the fact, a merger's merits without any compelling justification — precisely the judicial meddling that the business judgment rule is intended to prevent," Judge Sorokin said.

The blow to investors comes after Judge Sorokin **trimmed the proposed shareholder suit in March**, ruling in the brothers' favor on questions of securities violations.

When merger talks began between the two Waltham, Massachusetts-based companies in January 2016, John was the co-CEO of both ADGE and Tecogen, as well as a director of each company, while George served as technical adviser to ADGE and had previously served on the board of both businesses, Sorokin said.

ADGE operates and distributes systems that produce electricity and heat, and Tecogen makes and sells electricity generation systems.

The proxy statement issued to shareholders described the negotiation process and the two companies' overlapping leadership and ownership, according to Judge Sorokin. Stockholders overwhelmingly voted in favor of the merger, which was finalized in May

2017.

The ADGE investors, Lee Vardakas and William Chase May, claimed the brothers and the management teams at both companies began outlining the merger without informing either company's board of directors, only to announce a deal that significantly undervalued ADGE shares months later.

Following the merger, Tecogen shareholders were allotted approximately 81 percent of the combined company, while ADGE shareholders were left with 19 percent. Yet ADGE contributed nearly half of the assets and just over half the shareholder equity in the merger, according to the suit.

Judge Sorokin threw out the investors' argument that ADGE's directors also breached their fiduciary duty by undervaluing the stock, finding they were protected by a provision in ADGE's certificate of incorporation that limited the investors' claims to breaches of loyalty and good faith, which also failed.

"May argues that he need not present specific facts as to each director because he has alleged that the directors were ' beholden to the Hatsopoulos brothers,' but that conclusory allegation is unsupported by specific facts," Judge Sorokin said.

The dismissal of the breach of fiduciary duty claims against the brothers and the directors also meant that the investors' final allegation that George Hatsopoulos and Tecogen aided and abetted ADGE's executives in cheating them out of a better deal was no longer relevant, and was therefore also tossed by Judge Sorokin.

Representatives for the parties did not immediately respond to requests for comment on Monday.

The plaintiffs are represented by Carl L. Stine and Adam J. Blander of Wolf Popper LLP, Juan E. Monteverde of Monteverde & Associates PC, Norman Berman and Nathaniel L. Orenstein of Berman Tabacco, and Jason M. Leviton of Block & Leviton LLP.

The defendants are represented by Paul E. Summit of Sullivan & Worcester LLP and Andrew T. Solomon of Sullivan & Cramer LLP.

The case is Vardakas v. American DG Energy, Inc. et al, case number 1:17-cv-10247, in the U.S. District Court for the District of Massachusetts.

--Additional reporting by Aaron Leibowitz and Alison Noon. Editing by Emily Kokoll.

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